



City Research Online

City, University of London Institutional Repository

Citation: Kalintiri, A. ORCID: 0000-0002-6281-7724 (2013). The Right to Property: New Ammunition for Competition Litigation?. *Competition Law Journal*, 4, pp. 416-427.

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/21433/>

Link to published version:

Copyright: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

Reuse: Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

The right to property: New ammunition for competition litigation?

Andriani Kalintiri¹

Introduction

The increased awareness of the impact of fundamental rights on all areas of European activity has long reached the field of competition law.² The absence of a distinct European legal basis for their protection has not prevented the European Courts from upholding the importance of fundamental rights as ‘an integral part of the general principles of Community law, whose observance is ensured by the Community judicature’.³ On top of this general constitutional declaration, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty (Regulation 1/2003)⁴ and Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation)⁵ leave no doubt about the status of fundamental rights in the competition context. Worded identically, Recitals 37 of Regulation 1/2003 and 36 of the EU Merger Regulation unequivocally state that the fundamental rights must be respected, and both Regulations should be interpreted and applied in the light of the fundamental rights. This imperative is fully in alignment with the demands and expectations of both the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the Convention), and the Charter of Fundamental Rights of the European Union (the Charter).⁶

So far the lion’s share of the attention has gone to the discussion of the parties’ rights of defence and the alleged criminal nature of antitrust fines.⁷ The agenda includes, inter alia, the right to a fair trial, the right not to incriminate oneself, the right to respect for private life, the right of access to the file, legal privilege, the confidentiality of business secrets and so on. However, the list is non-exhaustive. Undertakings can benefit from any of the rights enshrined in the Convention or in the Charter to defend their case. In this spirit, sporadic case-law examples suggest that there may be room for claims of another fundamental right in competition litigation, that is, the right to property. Therefore, this article will consider the role – if any – for

¹ PhD Candidate and Teaching Assistant at the Centre for Commercial Law Studies, Queen Mary University of London.

² See, for example, Arianna Andreangeli, *EU Competition Enforcement and Human Rights* (Edward Elgar Publishing, 2008); Lyubomir Talev, ‘ECHR Implications in the EU Competition Enforcement’ (Due Process and Innovation in EU Competition Law, Centre for European Policy Studies, Brussels, 16 April 2010), available at http://www.varadinovlaw.com/it/?page_id=100.

³ *Mannesmannröhren-Werke v Commission* (Case T-112/98) [2001] ECR II-729, at para 60.

⁴ (2003) OJ L 1/1.

⁵ (2004) OJ L 24/1.

⁶ (2000) OJ C 364/1. For the time being, the Charter constitutes the primary legal basis for the protection of fundamental rights in the EU.

⁷ See, for example, Wouter Wils, ‘Is Criminalization of EU Competition Law the Answer?’ (2005) 28 *World Competition* 117; Wouter Wils, ‘The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights’ (2010) 33 *World Competition* 5; Ian Forrester, ‘Due process in EC competition cases: A distinguished institution with flawed procedures’ (2009) *The European Law Review* 817.

the right to property in competition proceedings. More specifically, the first section will briefly present the right to property and its legal foundations. Then, the second section of the article will examine the property-related pleas in competition litigation so far. Finally, the third section will conclude with some thoughts on the limitations of such pleas, as well as an evaluation of the future role that the right to property may play in competition litigation.

The right to property

Property rights are a core element of a market economy. Protection of property ownership has been a *sine qua non* condition for the economic development of any society. From a commercial perspective, ensuring ownership is essential in order to preserve the healthy and effective operation of trade activities in a market. The rule is that companies own assets and exploit them to make profit, or to expand their business, while also competing with each other. In that sense, the idea that property is to be safeguarded and respected is a rather old story.

This reality is particularly acknowledged in the European legal order with its system of free trade and its objective of market integration. Indeed, property holds a special position in the EU. Article 345 TFEU reads that ‘The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership’.⁸ In addition, the right to property is afforded specific protection in Art 1, Protocol 1 to the Convention, and Art 17 of the Charter. More specifically, the Convention enshrines the peaceful enjoyment of one’s possessions. Likewise, Art 17 of the Charter declares that ‘Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions’.⁹ However, the right to property is not unqualified; the State may deprive possessions or may control the use of property. Nonetheless, to be lawful such restrictions should be in accordance with the requirements prescribed in Art 1, Protocol 1 to the Convention, and Art 17 of the Charter. In general terms, any interference in the form of either deprivation or control of the use of property by the State should be justified by reasons of public and/or general interest and should comply with the conditions provided for by law.¹⁰

The core position that the right to property holds in the system of fundamental rights is proved by the volume of judgments of the European Court of Human Rights (ECtHR) finding a violation. In fact, violations of Art 1, Protocol 1 to the Convention rank second in the statistics, right after violations of Art 6 of the Convention regarding either the fairness or the length of the proceedings.¹¹ In its rulings, the ECtHR has set the principles governing the protection afforded to the right. As for the scope of the provision, according to settled case-law the concept of ‘possessions’ has an autonomous meaning within the Convention.¹² Moreover, ‘property’ has been interpreted in a very wide way so as to cover a wide array of assets with economic value, including, *inter alia*, movable or immovable property, tangible or intangible

⁸ See Art 345 (ex Art 295 TEC) TFEU.

⁹ See Art 17(1) of the Charter.

¹⁰ See Art 1(1) and (2) of Protocol 1 to the Convention and Art 17(1) of the Charter. Also Art 52(1) of the Charter.

¹¹ See *Overview 1959–2012*, ECHR Statistics (ECHR, 2013), available at http://www.echr.coe.int/Documents/Overview_19592012_ENG.pdf, accessed 24 August 2013.

¹² See *Gasus Dosier- und Fördertechnik GmbH v the Netherlands* (Application No 15375/89) [1995] ECHR 7, (1995) 20 EHRR 403, ECHR, at para 53.

interests,¹³ ownership of shares,¹⁴ and the economic interests connected with the running of a business.¹⁵ At any rate though, regardless of the nature of the asset falling within the scope of ‘possessions’, any restriction on the property of the right holder should satisfy the principle of lawfulness and of proportionality.¹⁶

In sharp contrast with the attention that the right to property has attracted in the Convention system, in the EU competition context references to this right are scarce, not only in the case law, but also in the literature. Typically, the right to property is coupled with the right to respect for private life¹⁷ and the freedom of expression¹⁸ to provide the combined foundations of a more general freedom to engage in economic activity. Although such freedom to trade is not explicitly enunciated in the Convention, there would seem to be little disagreement that its acknowledgment is in harmony with – if not necessitated by – the Convention structure.¹⁹ Along the same lines, in the merger context the right to property has also been considered to underpin the parties’ so-called ‘right to merge’, as a special form of the broader freedom to contract.²⁰ Moreover, in the same spirit as the Convention, the Charter seems to dispel any lingering doubts about the existence of a freedom to trade. Right before Art 17 which establishes the right to property, Art 16 explicitly provides for the freedom to conduct business.²¹

The above brief account illustrates that property ownership and economic liberty hold a pivotal position in the European legal system. However, litigants in competition proceedings have only exceptionally invoked this right to defend themselves against a Commission decision. Similarly, the Courts have handled such arguments in a careful manner. The next section will consider how the right to property has been employed in competition litigation.

Pleas of the property right in EU competition litigation

A quick search in the online database of European Courts’ judgments is revealing. Only a handful of judicial decisions contain a reference to the right to property, while their greatest portion relates to State aid cases. As far as infringement and merger proceedings are concerned, there have been in total four instances where the

¹³ See, for example, *Beyeler v Italy* (Application No 33202/96), at para 100; *Öneryıldız v Turkey* (Application No 48939/99), at para 124.

¹⁴ *Bramelid and Malmström v Sweden* (Application No 8588/79 and 8589/79), Commission decision of 12 October 1982, Decisions and Reports (DR) 29, p 64.

¹⁵ *Tre Traktörer Aktiebolag v Sweden* (Application No 10873/84), judgment of 7 July 1989, at para 53.

¹⁶ See *Sporrong and Lönnroth v Sweden* (Application No 7151/75; 7152/75), judgment of 23 September 1982, at paras 61, 63 and 69 (*Sporrong*).

¹⁷ Article 8 of the Convention. See also *Niemietz v Germany* (Application No 13710/88) [1993] 16 EHRR 17, at para 29, where the ECtHR stressed that there is no reason to understand the notion of ‘private life’ as excluding ‘activities of a professional or business nature’. Likewise, the concept of ‘home’ was interpreted to also cover ‘business premises’.

¹⁸ Article 10 of the Convention. See also *Markt Intern Verlag GmbH and Klaus Bernmann v Germany* (Application No 10572/83) [1990] 12 EHRR 161, at para 26, where it was highlighted that the exchanged information may be of a commercial nature.

¹⁹ Andreangeli, op cit n 2, at 16.

²⁰ See further below.

²¹ Article 16 of the Charter reads: ‘The freedom to conduct a business in accordance with Community law and national laws and practices is recognised’.

defendants explicitly referred to their right to property.²²

The first case to involve an allegation of breach of the defendant's right to property was *Van den Bergh Foods v Commission*,²³ published in 2003. Van den Bergh Foods (formerly HB Ice-Cream) was forced by Commission decision to remove the exclusivity clause that was incorporated in its distribution agreements. According to this clause, HB was supplying ice-cream retailers with freezer cabinets free of charge or at a nominal rent, provided that they were used exclusively for stocking HB ice-cream.²⁴ HB was also responsible for maintaining the cabinets, save in circumstances of negligence on part of the retailer. The Commission concluded that this clause was incompatible with (now) Arts 101 and 102 TFEU as its cumulative effect resulted in precluding competing suppliers from selling their products to those outlets, thereby restricting competition between suppliers in the relevant market.²⁵ In its action for annulment however, HB claimed, *inter alia*, that such decision interfered with its property rights over the freezer cabinets. Although HB accepted that the right to property is not absolute, it considered the Commission decision as constituting a disproportionate and intolerable interference, which goes to the substance or essence of its right, as it eliminates the economic value of its network of freezer cabinets available at the outlets for storage and sale of its ice-cream.²⁶

The Court was quick to dismiss HB's arguments by reiterating settled case-law, according to which:

‘... although the right to property forms part of the general principles of Community law, it is not an absolute right but must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed. Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC) provides that in order to achieve the aims of the Community, its activities are to include “a system ensuring that competition in the internal market is not distorted”. It follows that the application of Articles 85 and 86 of the Treaty constitutes one of the aspects of public interest in the Community. Consequently, pursuant to those articles, restrictions may be applied on the exercise of the right to property, provided that they are not disproportionate and do not affect the substance of that right.’²⁷

Examining then whether HB's property right over the freezer cabinets, as well as its right to exploit them commercially had been affected by the Commission decision, the Court observed that this decision does not inflict upon the ownership of HB's assets but ‘merely regulates, in the public interest, one particular aspect of exploiting them, in the same way, as, for example, the legislature in many Member States intervenes in

²² This article does not consider issues touching upon the interface of competition law and intellectual property.

²³ *Van den Bergh Foods v Commission* (Case T-65/98) [2003] ECR II-4653.

²⁴ *Ibid*, at para 2.

²⁵ *Ibid*, at paras 15–16.

²⁶ *Ibid*, at paras 164–166.

²⁷ *Ibid*, at para 170 (references omitted).

order to protect a tenant’.²⁸

The second case of interest to our analysis is the well-known *General Electric/Honeywell*²⁹ merger case. In its attempt to annul the Commission decision declaring the concentration as incompatible with the common market, the defendant put forward a number of pleas relating, among others, to procedural irregularities regarding its access to the file. Stressing the importance of ensuring the rights of defence in all proceedings, the applicant emphasised that ‘Procedural guarantees are of utmost importance in merger proceedings’.³⁰ Then, it listed a number of arguments justifying this allegation, claiming, inter alia, that ‘merger proceedings call into question the fundamental right to property’, that ‘by suspending the merger, merger proceedings adversely affect the parties’ interests’, and that ‘losses as a result of the unlawful prohibition of a merger cannot be fully recovered’.³¹ It is these aspects of the particular nature of merger proceedings that ‘may require that there be a different level of protection, but not necessarily that it be greater or less than the level offered in infringement proceedings’.³²

The Commission dismissed the essence of General Electric’s arguments, in part by claiming that ‘the right to merge is not a fundamental right and, if a distinction must be made, such a right would not require a greater standard of protection than that offered in proceedings resulting in sanctions’.³³ In response to the parties’ arguments, the Court once again synthesised its approach to the right to access the file, its rationale and its scope.³⁴ Nonetheless, it is remarkable that the Court tactfully avoided engaging itself in a conversation about the relevance of the right to property to merger proceedings, or the existence of a right to merge. Instead, it merely clarified that:

‘Contrary to the applicant’s submission, the rights of the defence are not to be applied with a standard of protection which is different or more extensive in merger control cases than in proceedings involving infringements of Community competition law.’³⁵

The third case where the right to property has been invoked by the parties against a Commission decision is *SGL Carbon v Commission*³⁶ in 2006. Here the question of the implications of the right to property was approached from a totally different angle. In particular, having been fined by the Commission for participation in the graphite electrodes cartel, SGL Carbon attempted to have that decision annulled by alleging, inter alia, that the Commission unlawfully failed to take into consideration its ability to pay the fine. In particular, the appellant argued that its financial viability had already been stretched to its limits by the heavy fines imposed by other competition

²⁸ Ibid, at para 176.

²⁹ *General Electric Company v Commission* (Case T-210/01) [2005] ECR II-5575 (*General Electric*).

³⁰ Ibid, at para 624.

³¹ Ibid.

³² Ibid, at para 626.

³³ Ibid, at para 628.

³⁴ Ibid, at paras 629–631.

³⁵ Ibid, at para 631.

³⁶ (Case C-308/04P) [2006] ECR I-5977 (*SCL Carbon*).

authorities and the high level of damages which it had to pay in non-member States.³⁷ Therefore, a further heavy fine by the Commission would threaten its financial survival. In light of this, the General Court's decision to uphold the Commission's approach 'infringed the principle of proportionality and the protection of the rights of undertakings deriving from economic freedom and property ownership'.³⁸

The Court repeated past case-law that consideration of the poor financial situation of an undertaking was not required when determining the amount of fine, and emphasised that 'that case-law is in no way called in question by Section 5(b) of the Guidelines, which states that an undertaking's real ability to pay must be taken into consideration', as 'that ability can be relevant only in a "specific social context"', evidence of which was not provided by the appellant.³⁹ Considering then the allegation concerning infringement of the right to property, the Court straightforwardly rejected this argument, by noting that the freedom to conduct business and the right to property 'are subject to public-interest restrictions and that they cannot be relevant in the context of setting a fine for an infringement of Community competition law'.⁴⁰

Finally, the last case where the parties expressly had recourse to their right to property to contest a Commission decision is the recent *Schindler Holding* judgment.⁴¹ This case provided the Court with the opportunity to ponder on a number of fundamental rights pleas. This ruling will probably become more known for its upholding the judgment of the European Court of Human Rights in *Menarini*⁴² on the compatibility of the European judicial review system with Art 6 of the Convention. Nonetheless, the defendants' argument concerning infringement of its right to property deserves our attention as well. In this case, Schindler Holding contended that the Commission decision imposing on it a fine for its participation in the elevators and escalators cartel was of a confiscatory nature, in breach of international law. More specifically, the applicants invoked the principle of the protection of foreign investors which also covers their cross-border holding of shares in an undertaking established in another Member State.⁴³ According to this principle, expropriation of foreign investments is allowed only under very strict conditions. Relying on this line of argument, the applicants claimed that 'the fines imposed upon Schindler Holding, a company established under Swiss law, equate, in economic effect, to the expropriation, contrary to international law, of Schindler Holding's investments in Belgium, Luxembourg and the Netherlands'.⁴⁴ Then, the parties clarified that 'whilst an order to pay a fine does not constitute expropriation in form, it nevertheless constitutes expropriation in fact'.⁴⁵

³⁷ Ibid, at para 101.

³⁸ Ibid, at para 102.

³⁹ Ibid, at paras 106–107.

⁴⁰ Ibid, at para 108.

⁴¹ *Schindler Holding v Commission* (Case T-138/07) [2011] ECR II-4819 (*Schindler Holding*).

⁴² *A Menarini Diagnostics SRL v Italy* (Application No 43509/08), judgment of 27 September 2011 (*Menarini*).

⁴³ *Schindler Holding*, at para 185.

⁴⁴ Ibid, at para 186.

⁴⁵ Ibid. Similar discussions exist in the field of investment law. See, for example, OECD, *Indirect Expropriation and the 'Right to Regulate' in International Investment Law* (Working Papers on International Investment No 2004/4, September 2004).

Replying to this plea, the Court recalled the Community's obligation to respect international law in the exercise of its powers and confirmed the classification of the right to property as a general principle of EU law.⁴⁶ Following these preliminary observations, the Court then proceeded with examining whether the applicants' right to property had been indeed affected by the imposition of the fine. Adhering to its past utterances, it repeated its position in *Van den Bergh*⁴⁷ and the cited case-law therein, and concluded that it should examine whether the fines imposed constitute a 'disproportionate and intolerable interference, impairing the very substance of the fundamental right to respect for property'.⁴⁸ Observing first that the contested decision did not affect Schindler's ownership structure, the Court took the view that the fines were not excessive in light of the 10% ceiling set by Regulation 1/2003 and the fact that the fine was imposed upon Schindler Holding as a single group comprising more companies jointly and severally liable for its payment.⁴⁹

Unsatisfied with the General Court's synoptic dismissal of their argument, the undertakings again pleaded a breach of their right to property on appeal. This time, they explicitly referred to Art 17(1) of the Charter, as well as Art 1, Protocol 1 to the Convention, and they complained that 'the General Court did not carry out the review of proportionality in the light of the case-law of the European Court of Human Rights, in particular its judgment in *Mamidakis v Greece*, but referred solely to its own case-law and that of the Court of Justice'.⁵⁰ However, the Court of Justice rejected the plea on typical grounds, asserting that the appellants never really relied on the protection of the right to property as a fundamental right. In any event, if they wished to benefit from this right, they should have illustrated why the General Court erred in law by not giving the right to property 'the same meaning and scope as those laid down by the [Convention]'.⁵¹

Property-related claims: The caveat and a future (?)

The extremely low level of case-law references to the right to property, as well as the above account of relevant cases indicate that there is little room for pleas of this right in competition litigation. The first remarkable observation is that the parties' lawyers have at times engaged in creative thinking in their effort to establish a ground for annulment of the Commission decision affecting their clients' interests. In so doing, they have attempted to expand the pool of fundamental rights, whose plea may serve that purpose.

However, the fact remains that pleas of breach of the parties' ownership rights come with an important caveat: as both litigants and the Courts have acknowledged, the right is not unlimited. Undoubtedly, ownership of property is closely intertwined with commercial activity. To the extent though that economic freedom is subject to regulatory restraints, the exercise of the right to property will be similarly subject to these restraints. Competition law in particular is predominantly regulatory in nature.⁵²

⁴⁶ *Schindler Holding*, at paras 187–188.

⁴⁷ See n 23, above.

⁴⁸ *Schindler Holding*, at paras 189–191.

⁴⁹ *Ibid*, at paras 192–195.

⁵⁰ *Schindler Holding v Commission* (Case C-501/11P) [2013] (unreported), at para 125.

⁵¹ *Ibid*, at paras 126–128.

⁵² Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (2nd edn, Cambridge University

That explains why a Commission decision finding an infringement of the competition provisions is highly unlikely to ever be considered as a breach of the *essence* of the right to property. The very nature of competition provisions diminishes the chances of a successful plea of breach of a property right in its traditional ‘old’ conception. After all, the Courts have pronounced that enforcement of the competition rules is a public interest.⁵³ Consequently, Commission decisions finding an infringement or declaring the incompatibility of a concentration with the common market serve by definition a general objective capable of legitimising restrictions on the right to property. In that sense, the first condition of the judicial test for evaluating pleas of breach of the right to property will always be satisfied. Thus, the Court’s approach in *Van den Bergh Foods* was only to be expected.

This may not be the end of the discussion though. There remains one possible way in which undertakings may benefit from a plea of the right to property: if the Commission decision affecting this right constitutes, in the Court’s words, a ‘disproportionate and intolerable interference’.⁵⁴ That said, it is important to bear in mind that the control that the Courts exercise over the Commission’s discretion already includes a proportionality test. As Advocate-General Kokott illustrated in the *Spanish Tobacco* case:

‘... when it exercises this discretion under Article 23(2)(a) of Directive 1/2003, the Commission does not have complete freedom but must observe the general legal principles of European Union law and the fundamental rights guaranteed at European Union level. In particular, it is bound by the principle of equal treatment and the principle of proportionality.’⁵⁵

Yet, the question remains whether the proportionality analysis of the European Courts falls in line with the formula of the European Court of Human Rights. In *Schindler Holding* the Court of Justice was unwilling to engage in a detailed examination of this question. As we explained earlier, it dismissed the plea by stating that the parties never really relied on the right to property and that, in any case, they failed to demonstrate how the approach of the General Court fell short of the protection afforded by the Convention.

Nevertheless, a better-presented property claim may yield different results in the future. Indeed, *Mamidakis v Greece*⁵⁶ offers some interesting lessons. Adhering to its

Press, 2010), at 908.

⁵³ See, for example, *Schindler Holding*, at para 190; See also *Masterfoods and HB* (Case C-344/98) [2001] ECR I-11369, Opinion of AG Cosmas, at para 105: ‘I would point out that the right to property ownership is safeguarded in accordance with the principles found in the constitutions of the Member States; those fundamental national rules distinguish the core of the right in question, infringement of which is in principle prohibited, from the exercise of that right, which may be restricted on the ground of the general interest in so far as that is necessary. There is no doubt that Articles 85 and 86 of the EC Treaty occupy an important position in the system of the Community legal order and serve the general interest which consists in ensuring undistorted competition. Consequently, it is perfectly comprehensible for restrictions to be placed on the right to property ownership pursuant to Articles 85 and 86 of the EC Treaty, to the degree to which they might be necessary to protect competition. Article 222 of the EC Treaty may in no event be used as a shield by economic operators to avoid application of Articles 85 and 86 to their detriment’ (emphasis added).

⁵⁴ See n 27, above.

⁵⁵ *Alliance One International Inc and Others v Commission* (Joined Cases C-628/10 P and C-14/11 P) (*Spanish tobacco*) (2012) (unreported), Opinion of AG Kokott, at para 48.

⁵⁶ (Application No 35533/04), judgment of 11 January 2007 (available in French only) (*Mamidakis*).

approach in earlier rulings, the ECtHR repeated the three rules in Art 1, Protocol 1.⁵⁷ It then concluded that taxes, other contributions and fines constitute a form of property deprivation in the meaning of the second line of paragraph 1, because of the inflicted person's obligation to pay an amount of money.⁵⁸ Such interference with ownership may be lawful, though there must still be a 'relationship of reasonable proportionality between the employed means and the pursued interest'.⁵⁹ In particular, the ECtHR pointed out that proportionality may be infringed in the case of an excessive charge, or where the fine fundamentally interferes with that person's financial situation.⁶⁰

Considering now the potential impact of this case-law for competition litigation, there are two important observations to make. First, in the spirit of *Mamidakis v Greece*, antitrust fines do constitute forms of property deprivation calling for the application of Art 1, Protocol 1 to the Convention. In this light, Commission fines should be checked against their proportionality. However, the real question is what levels of fines should be considered as 'excessive' in the meaning of *Mamidakis*. In that particular case, the ECtHR found a violation of Art 1, Protocol 1 on proportionality grounds because the fines imposed were multiples of the amount of taxes evaded.⁶¹ On the EU competition front though, the ceiling of 10% for the determination of fines may affect the proportionality analysis by undermining the chances of a successful plea of excessive fining.

Secondly, the ECtHR held that the proportionality principle may be also infringed when the fine fundamentally interferes with the inflicted person's financial situation. However, *SGL Carbon* confirmed that in the EU competition context the Commission is by no means obliged to take into account the undertaking's ability to pay, it merely has discretion to do so. More specifically, according to para 35 of the Fines Setting Guidelines, 'in exceptional cases, the Commission *may*, upon request, take account of the undertaking's inability to pay in a specific social and economic context', while 'A reduction *could* be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value'.⁶² However, the ECtHR's position in *Mamidakis v Greece* may imply that the Commission should be under an obligation to consider the effect of the fine on the undertakings' financial situation to make sure that the fine does not constitute a 'fundamental interference'. In this case, the Courts should also control whether the parties' ability to pay has been properly taken into account.

On a different note, the right to property may also be of significance in the merger control context. The Court's observation in *Schindler Holding*, an Art 101 TFEU case, that the fine did not affect Schindler's ownership structure, may be reversed to

⁵⁷ Ibid, at para 43.

⁵⁸ Ibid, at para 44.

⁵⁹ Ibid (the author's translation).

⁶⁰ Ibid, at para 45. See also *Sporrong*, at para 69, where the ECtHR established the test of a 'fair balance' being struck 'between the general interests of the community and the requirements of the protection of the individual's fundamental rights'.

⁶¹ *Mamidakis*, at para 47.

⁶² Guidelines on the method of setting fines imposed pursuant to Art 23(2)(a) of Regulation No 1/2003, at para 35 (emphasis added).

establish an interference with the right to property in a merger case in circumstances where the Commission decision does interfere with the parties' ownership structure. Most importantly, arguments concerning the right to property may be of value from a procedural viewpoint. The fact that the Commission decisions interfere with the undertakings' rights because of their regulatory nature, even in a lawful and legitimate way, implies that decisions taken against the interests of the parties should be accompanied by sufficiently strong procedural guarantees.⁶³ In essence, the drive behind General Electric's reference to its right to property and to merge was to demonstrate that 'procedural guarantees are of utmost importance in merger proceedings' *because* of the restrictions on the right to property that such proceedings inevitably entail. Although these limitations may be in compliance with Art 1, Protocol 1 to the Convention, and Art 17 of the Charter, proceedings leading to such constraints should still stand up to the requisite level of procedural fairness.

Furthermore, pleas of the right to property may have a more substantive impact on merger analysis. Its combination with the broader freedom of economic activity has fuelled a discussion that merger evaluation should start from the point of a presumption of legality, as opposed to the principle of neutrality that currently underpins the Commission and the judicial approach.⁶⁴ The seed for this suggestion was first planted by Advocate-General Tizzano in his Opinion in *Tetra Laval*,⁶⁵ where he took the view that in a grey area – that is, an area where it is 'impossible to arrive at a clear distinct conviction that the likelihood that a dominant position will be created or strengthened is significantly greater or less than the likelihood that such a position will not be created or strengthened'⁶⁶ – the correct solution is to authorise the transaction.⁶⁷ To defend this proposition, Advocate-General Tizzano presented three arguments, relying, *inter alia*, upon the danger of 'unjustifiably restraining the parties' freedom of economic activity' that the risk of authorising a transaction incompatible with the common market entails.⁶⁸ Admittedly a presumption of legality cannot have the same procedural and substantive effect as the presumption of innocence that applies to antitrust proceedings.⁶⁹ However, although the Courts have steadily insisted on the neutrality approach, a different judicial line in the future, inspired by the right to property and the economic liberty of the individual, cannot be ruled out.

Conclusion

The core position that ownership holds in a market economy is reflected in the constitutional protection afforded to the right to property by both the Convention and the Charter, as well as by the judgments of the European Courts. However, pleas of this right are reasonably uncommon in competition litigation. Our brief account of the

⁶³ See, for example, *Commission v Lisrestal et al* (Case C-32/95P) [1996] ECR I-5373, at para 21.

⁶⁴ See *Bertelsmann and Sony Corporation of America v Impala* (Case C-413/06 P) [2008] ECR I-4951, at para 48; David Bailey, 'Standard of Proof in EC Merger Proceedings: A Common Law Perspective' (2003) 40 *Common Market Law Review* 845, 875–878.

⁶⁵ *Commission v Tetra Laval BV* (Case C-12/03 P) [2005] ECR I-987 (*Tetra Laval II*).

⁶⁶ *Tetra Laval II*, Opinion of A-G Tizzano, at para 76.

⁶⁷ *Ibid*, at para 77.

⁶⁸ *Ibid*, at para 79.

⁶⁹ See *Hüls v Commission* (Case C-199/92 P) [1999] ECR I-4287, at para 150. See also *Montecatini v Commission* (Case C-265/92 P) [1999] ECR I-4539, at paras 175–176. The presumption of innocence is absolute and cannot be constrained.

relevant case-law demonstrates that the scarcity of property-related claims is explained by the caveat that accompanies any such claims, that is, that the right is not absolute but may be subject to legitimate restrictions. Indeed, the competition rules constitute examples of such limitations. In this context, the proportionality test seems to be the only possible way for undertakings to benefit from a property-related claim in antitrust litigation. However, the implications of the right to property and the associated economic freedom may also have some impact on merger proceedings, either by increasing the requisite standards of procedural fairness, or by underpinning a presumption of legality as the guiding principle for merger evaluation.